

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

DARIUS HAMILTON,

Defendant and Appellant.

B266673

(Los Angeles County
Super. Ct. No. BA432464)

APPEAL from a judgment of the Superior Court of Los Angeles County, C.H. Rehm, Judge. Affirmed.

James R. Bostwich, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Darius Hamilton's appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), requesting independent review of the record. We notified Hamilton by letter that he could submit any claim, argument, or issues he wished our court to review. He filed a supplemental letter brief, in which he contends he received ineffective assistance of counsel, both at trial and on appeal, and the trial court erroneously denied his motion to represent himself. We affirm the judgment.

FACTS

On December 26, 2014, Hamilton robbed a cashier at Superior Grocery Store on Slauson and Vermont. Surveillance video showed Hamilton approaching the cashier from behind and running up beside her when she opened the cash register to get change for a customer. He grabbed money from the register, and ran toward the exit. The supervisor on duty that night intercepted Hamilton at the door and grabbed his belt buckle. Another employee put Hamilton in a headlock. The three scuffled until the security guard arrived. Hamilton was eventually subdued and arrested. The supervisor recovered \$300 in \$20 bills from the ground in front of the store.

Hamilton was charged with second degree robbery in violation of Penal Code¹ section 211. It was further alleged he suffered one prior conviction for voluntary manslaughter, which constituted a serious or violent felony as described in sections 667, subdivision (d), 667.5, subdivision (c), 1170.12, subdivision (b), and 1192.7, subdivision (c). At trial, the video of the incident was shown to the jury and the cashier and supervisor identified

¹ All further section references are to the Penal Code unless otherwise specified.

Hamilton as the robber. They also testified to the events depicted in the surveillance video.

The jury returned a guilty verdict on the robbery count and the trial court found the prior conviction allegations to be true. It granted Hamilton's *Romero*² motion to strike the prior serious felony. Hamilton was sentenced to a total of 11 years in state prison, comprised of the upper term of five years plus consecutive terms of five years pursuant to section 667, subdivision (a)(1) and one year pursuant to section 667.5, subdivision (b). Hamilton appealed and we appointed counsel.

DISCUSSION

Hamilton's appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), requesting independent review of the record. We notified Hamilton by letter that he could submit any claim, argument, or issues he wished our court to review.

In response, Hamilton filed a supplemental brief on October 24, 2016, setting forth the errors which he contends warrant reversal. First, he contends he received ineffective assistance of counsel because he was appointed new trial counsel 30 minutes prior to trial and a request for a continuance was denied by the trial court. Second, he contends the trial court erroneously denied his request to represent himself under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). Finally, Hamilton requests his appellate counsel be relieved and new counsel appointed on the ground his failure to raise any issues in the opening brief automatically renders him ineffective. We decline to reverse the judgment on this basis or appoint new counsel.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

I. Ineffective Assistance of Counsel at Trial

To establish a claim of ineffective assistance of counsel, a defendant must show his counsel's performance fell below an objective standard of reasonableness in the light of prevailing professional norms and a reasonable probability that, but for counsel's failings, the result would have been more favorable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *In re Harris* (1993) 5 Cal.4th 813, 832-833.) On appeal, we presume trial counsel rendered adequate assistance and exercised reasonable professional judgment in making trial decisions. (*People v. Holt* (1997) 15 Cal.4th 619, 703.) Hamilton has failed to demonstrate either deficient performance or prejudice.

Hamilton asserts he was assigned new trial counsel two days before trial was set to begin. On the day of trial, he met his new counsel just 30 minutes before jury selection began. The record shows the deputy public defender assigned to represent him announced ready in the master calendar court on the day of trial and she indicated the defense was ready to proceed upon the trial court's questioning.

Hamilton contends his trial counsel had no familiarity with the case and was unable to make objections at the proper times, effectively cross-examine witnesses, or present an actual defense. The record belies Hamilton's assertions.

At trial, counsel urged the jury to find Hamilton guilty of the lesser included crime of petty theft, arguing a crucial element of robbery—use of force or fear—was not shown by the prosecution. The jury was instructed that the force required for robbery must be more than the incidental touching necessary to take the property. Defense counsel argued the surveillance video did not show Hamilton used force or fear to take the money. She

effectively cross-examined the cashier, who admitted Hamilton did not make her arm move when he reached in to take the cash from the register. The supervisor admitted on cross-examination that she was not scared of Hamilton when she struggled with him at the door. Further, the trial court sustained objections made by defense counsel and Hamilton does not specify what other objections she should have made. In short, the record shows defense counsel made proper objections, effectively cross-examined the witnesses, and was familiar with the case.

Nevertheless, Hamilton claims trial counsel should have argued: (1) “Appellant only had a tenuous possession of the cash he’d grabbed out of the victim’s register because he was accosted by management at the establishment, before he ever exited the store[;]” and (2) he never made it to a place of relative safety, rendering the robbery incomplete. Hamilton misunderstands the elements of the crime of robbery.

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) A robbery has been committed when the defendant has forcibly removed property from the control of the owner, “even though the property may be retained by the thief but a moment.” (*People v. Quiel* (1945) 68 Cal.App.2d 674, 679.) “There is no requirement that defendant escape with the loot or that he reduce the property to his sole possession by chasing the victims away.” (*People v. Pham* (1993) 15 Cal.App.4th 61, 67.) Given the state of the law, Hamilton’s arguments would not have been successful and he was not prejudiced by trial counsel’s failure to assert them. On the whole, Hamilton fails to establish prejudice with regard to any of his claims of ineffective assistance. The

evidence of guilt was overwhelming: the video clearly showed Hamilton robbing the cashier and struggling with the supervisor.

We are not persuaded by Hamilton's reliance on *Powell v. Alabama* (1932) 287 U.S. 45 (*Powell*), which does not address the issue of ineffective assistance of counsel, but the outright denial of counsel. In *Powell*, the high court held that a trial court violated the defendants' due process rights by permitting a capital trial to go forward six days after the defendants were indicted and on the same day that attorneys were appointed to represent them at trial. No continuance was sought or given. (*Id.* at pp. 52-53.) *Powell* explained, "In the light of the facts outlined in the forepart of this opinion -- the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives -- we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process." (*Id.* at p. 71.) There was no denial of counsel in this case and *Powell* is inapplicable.

To the extent Hamilton is arguing that he should have been granted a continuance of trial, we reject this claim as well. Generally, a continuance may be granted only on a showing of good cause. (§ 1050, subd. (e).) A court has broad discretion to deny a motion for a continuance. (*People v. Grant* (1988) 45 Cal.3d 829, 844.) We find Hamilton's conclusory argument to be insufficient to establish that the trial court abused its discretion in not continuing trial, and insufficient to show that he was prejudiced by the court's error, if any.

II. Denial of a Request for Self-Representation

A trial court must grant a timely request for self-representation if the defendant knowingly and intelligently makes an unequivocal request after having been apprised of its dangers. (*Faretta, supra*, 422 U.S. at p. 835.) “ ‘When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court’s discretion.’ [Citation.] In exercising this discretion, the trial court should consider factors such as ‘ ‘the quality of counsel’s representation of the defendant, the defendant’s prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.’ ’ ” (*People v. Jenkins* (2000) 22 Cal.4th 900, 959, quoting *People v. Windham* (1977) 19 Cal.3d 121, 128.)

Courts have consistently found *Faretta* motions untimely when made the morning of trial, particularly when coupled with a request for a continuance. (*People v. Valdez* (2004) 32 Cal.4th 73, 102 (*Valdez*); *People v. Carlisle* (2001) 86 Cal.App.4th 1382, 1390 [“day of trial”]; *People v. Hall* (1978) 87 Cal.App.3d 125, 131 [“last possible moment before trial began”]; cf. *People v. Tyner* (1977) 76 Cal.App.3d 352, 356 [motion on first day of trial not untimely if not accompanied by request for continuance].) The timeliness requirement reflects a policy that “the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.” (*Martinez v. Court of Appeal* (2000) 528 U.S. 152, 162.)

On appeal, the erroneous denial of a timely *Faretta* motion is reversible per se. (*People v. Dent* (2003) 30 Cal.4th 213, 217; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8.) However, denial of an untimely *Faretta* motion may be reviewed for harmless error. (*People v. Rivers* (1993) 20 Cal.App.4th 1040 (*Rivers*).)

In *Valdez*, the defendant made a *Faretta* motion right before jury selection on the morning of trial. The defendant's previous request for a change of counsel had been denied. He asked to represent himself "[b]ecause I feel that I could do a much better job if I investigate other things that I need to investigate." As a result, he was not ready to proceed to trial that day. (*Valdez, supra*, 32 Cal.4th at p. 101.) The trial court denied the defendant's request. The California Supreme Court upheld the ruling, finding the defendant's motion untimely. Holding an untimely motion may be denied on the ground that delay or a continuance would be required, the high court found "the court acted within its discretion in concluding that defendant could represent himself only if he was ready to proceed to trial without delay." (*Id.* at p. 103.)

Prior to trial, Hamilton requested a new attorney pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), which was denied. New trial counsel was nevertheless subsequently appointed shortly before trial, as described above. On the morning of trial, Hamilton indicated he wished to represent himself because he just met his trial counsel and he felt he needed "more studying on this case." Hamilton asserted he was not ready for trial. His trial counsel indicated she was ready for trial and had declared ready in the master calendar court earlier that morning. Hamilton's request was denied by the trial court

for untimeliness. Hamilton contends the denial was unreasonable and arbitrary. We find no abuse of discretion.

As in *Valdez*, we are faced with a similarly untimely request. As in *Valdez*, Hamilton's request was made shortly before jury selection. As in *Valdez*, Hamilton indicated he was not ready to proceed to trial that day and requested a continuance. Hamilton explained he felt he "need[ed] more studying on this case." His defense counsel and the prosecutor, on the other hand, were ready for trial to proceed. "A trial court may properly consider the delay inherently caused by such uncertainty in evaluating timeliness." (*People v. Lynch* (2010) 50 Cal.4th 693, 728.)

Importantly, Hamilton did not say he believed his newly appointed counsel would be ineffective or that he disagreed with her trial strategy. He merely stated, "I feel I need more studying on this case . . . It's like if I have one lawyer I mean it's nothing against the lawyer I have right now but I don't know her. She doesn't know me. Just come today and say we are ready for trial." It is also telling that Hamilton elected to proceed with counsel after his *Marsden* motion was denied; he did not request to represent himself at that time. In light of these circumstances, the trial court did not abuse its discretion when it denied Hamilton's request.

Even if the trial court erroneously denied the untimely request for self-representation, we find the error was not prejudicial. (*Rivers, supra*, 20 Cal.App.4th 1040; *see also People v. Elliot* (1977) 70 Cal.App.3d 984, 998 [error was harmless where evidence of guilt was substantial].) Given the circumstances, it is unlikely Hamilton would have received a better outcome. As

discussed above, there was surveillance video which showed the entirety of his crime.

III. Request for Substitution of Appellate Counsel

We appointed counsel to represent Hamilton on appeal on December 16, 2015. On January 27, 2016, appointed counsel sought an extension of time to explore the same issues raised by Hamilton in his supplemental brief, namely, his rights pursuant to *Marsden* and *Faretta*. In a motion to augment the record and for an extension of time, appointed counsel outlined in detail the issues he believed might have merit. After several extensions of time, during which the record was augmented, counsel submitted a *Wende* brief and his declaration stating the record and decision to file a *Wende* brief were reviewed by a staff attorney at the California Appellate Project, Los Angeles.

Hamilton now requests a substitution of counsel on appeal on the ground his appellate counsel is ineffective for failing to raise any issues in the opening brief. It is apparent from the record that appointed counsel considered and rejected the very issues raised by Hamilton and likewise rejected in this opinion. He even sought additional review of his decision from the experienced attorneys at the California Appellate Project. We have also independently reviewed the record on appeal and find no arguable issues exist. (*Wende, supra*, 25 Cal.3d 436, *People v. Kelly* (2006) 40 Cal.4th 106.) Appointed counsel has fulfilled his duty. Accordingly, there is no justification for the appointment of substitute appellate counsel.

DISPOSITION

Hamilton's request for appointment of substitute counsel is denied. The judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.